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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 76-1031

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GEORGE PAPPAGEORGE,

Defendant and Petitioner.

APPEAL FROM
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Table of Authorities	vi
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	6
I. THERE CAN BE NO FAIR TRIAL WHERE THERE IS TENUOUS CIRCUMSTANTIAL EVIDENCE, A COMPLETELY SUSPICIOUS EYE WITNESS ACCOUNT, TAINTED BY FAVORS, GLARINGLY IRRELEVANT AND HIGHLY DAMAGING EVIDENCE ADMITTED, AND THERE IS A DEFENSE COUNSEL WHO IS OVER EXTENDED IN HIS WORKLOAD, AND WHO REJECTS DEFENDANT'S PLEAS TO PUT ON FOUR OR MORE WITNESSES WITH CRITICALLY IMPORTANT TESTIMONY AND FAILED TO RAISE, (ACCORDING TO THE STATE OF CALIFORNIA COURT OF APPEAL), AN ISSUE OF RELEVANCY CONCERNING DYNAMITE; ALTHOUGH NONE OF THESE FACTORS OR EVEN ANY TWO OR THREE OF THESE FACTORS STANDING ALONE WOULD NOT CONSTITUTE GROUNDS FOR ORDERING A NEW	

TRIAL, NONETHELESS, WHEN WEIGHTED TOGETHER, THEIR CUMULATIVE EFFECT OUTWEIGHS THEIR INDIVIDUALLY JUSTIFIED ALLOWANCE BY A TRIAL COURT. 6

II. THE DECISION OF THE CALIFORNIA COURT HAS OVERLOOKED THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF DOYLE v. OHIO, 96 S.CT. 2240 (1976) AND WHICH IS CONTROLLING ON IMPORTANT ISSUES IN THIS CASE. 16

III. THERE IS ADDITIONAL POST-TRIAL EVIDENCE WHICH CASTS STRONG DOUBT ON CREDIBILITY OF RONALD HAYWARD, THE ALLEGED EYEWITNESS. 18

IV. ALL EVIDENCE RELATING TO EXPLOSIVES SHOULD HAVE BEEN EXCLUDED AND FAILURE TO DO SO RESULTED IN PREJUDICIAL ERROR BY THE TRIAL COURT. 18

A. The Prejudicial Effect of the Evidence Far Outweighs Whatever Probative Value It May Have Had, and Under Evidence Code §1101, All References to Appellant's Involvement with Explosives Should Have Been Excluded. 18

B. The Objection to Admission of This Evidence Was Properly Raised at Trial and the Issue Has Thus Been Preserved for Appellate Review. 24

V. THERE IS INADEQUATE CORROBORATION OF RONALD HAYWARD'S TESTIMONY AS REQUIRED BY PENAL CODE SECTION 1111. 28

A. Appellant's Purchase of the Handcuffs May Not Serve as Corroboration Because It Is an Activity Equally Consistent with Innocence as with Guilt. 30

B. There Is No Evidence to Establish Appellant's Possession of the Handcuffs Used in the Carson's Bar Robbery, But Even if Possession Is Shown, There Is No Evidence to Establish Appellant's Exclusive Dominion and Control Over Them. 31

C. Others Had Access to Handcuffs, Whatever Their Serial Number Was. There Was No Exclusive Possession and Control By Mr. Pappageorge. 32

D. No Evidence Established Appellant's Possession of the Candelabra, Therefore, They Cannot Corroborate Hayward's Testimony. Alvin Timmons Testified That Appellant's Wife, Deceased at the Time of Trial, Delivered Candelabra to Timmon's Residence. The Photographs of These Candelabra Were Taken At Timmon's House. No Evidence Adduced at Trial Ever Placed the Candelabra In Appellant's Possession or in Appellant's Home. The Only Alleged Link to Mr. Pappageorge Is the Alleged Delivery by Mrs. Pappageorge. 34

E. Appellant's Knowledge of Part of the Contents Located in the Back Seat of a Car Not Owned By Him Does Not Establish His Knowledge of the Contents of a Closed and Covered Suitcase Found Inside the Trunk of That Car. 36

F. The Paper Stamped "Carson's" Cannot Corroborate Ronald Hayward's Testimony Because It Was Observed in a Public Access Area and Appellant's Exclusive Possession of the Paper Was Not Established. 39

G. There Exists No Other Independent Testimony Which Connects Appellant to the Crimes Committed By Hayward and Moran. 40

VI. THE PROSECUTING ATTORNEY COMMITTED PREJUDICIAL ERROR IN COMMENTING ON APPELLANT'S FAILURE TO PRODUCE CERTAIN WITNESSES AND RAISE CERTAIN DEFENSES, GIVEN THE SLIGHT WEIGHT OF THE EVIDENCE AGAINST APPELLANT. 45

VII. APPELLANT WAS PREJUDICED BY THE FAILURE OF DEFENSE COUNSEL TO PURSUE CERTAIN DEFENSES, PRESERVE OBJECTIONS FOR APPEAL, AND, IN GENERAL, RENDER EFFECTIVE REPRESENTATION. 49

CONCLUSION 53

APPENDICES
EXHIBITS "A" "B" and "C"

TABLE OF AUTHORITIES

Cases

Doyle v. Ohio (1976)
96 S.Ct. 2240 7, 16, 17, 45, 49

Griffin v. California (1964)
380 U.S. 609 45, 46

People v. Allums (1975)
47 Cal.App.3d 654 19

People v. Bisogne (1971)
4 Cal.3d 582 22

People v. Cannady (1972)
8 Cal.3d 379 24

People v. Carter (1973)
46 Cal.App.3d 260 19

People v. Delgado (1973)
32 Cal.App.3d 242 19, 20

People v. Edwards (1969)
71 Cal.2d 1096 39, 40

People v. Enos (1973)
34 Cal.App.3d 25 19

People v. Gordon (1973)
10 Cal.3d 460 42

People v. Hathcock (1973)
8 Cal.3d 599 40

People v. Ronald Frederick Hayward,
Case No. A131866, June 20, 1975 10

People v. Ibarra (1963)
60 Cal.2d 460 50

People v. Jenkins (1973)
34 Cal.App.3d 893 35, 43, 44

People v. Kageler (1973)
32 Cal.App.3d 738 42

People v. Krivda (1971)
5 Cal.3d 357, vacated, 409 U.S. 33,
aff'd 8 Cal.3d 623 (1972) 39

People v. Mardian (1975)
47 Cal.App.3d 16 29, 30, 43, 44

People v. Martin (1972)
28 Cal.App.3d 956 24

People v. Martinez (1975)
14 Cal.2d 533 — 49

People v. Medina (1974)
41 Cal.App.3d 438 — 16, 40, 46, 47

People v. Norwood (1972)
26 Cal.App.3d 148 — 25

People v. Perry (1972)
7 Cal.3d 756 — 42, 43

People v. Randono (1973)
32 Cal.App.3d 164 — 41, 42, 43

People v. Ruscoe (1976)
54 Cal.App.3d 1005 — 36, 41, 43, 44

People v. Rathford (1975)
14 Cal.3d 399, 121 Cal.Rptr. 261,
534 P.2d 1341 — 14, 15

People v. Stanworth (1974)
11 Cal.3d 588 — 49

People v. Stephenson (1974)
10 Cal.3d 652 — 49

People v. Talley (1967)
65 Cal.2d 830 — 22

People v. Tewksbury (1976)
15 Cal.3d 953 — 41, 42

People v. Thurman (1972)
28 Cal.App.3d 725 — 42

People v. Vargas (1973)
9 Cal.3d 470 — 45

United States v. Kahan
(S.D.N.Y. 1972) 350 F.Supp. 784 — 39

Winkie v. Turlock Irrigation District
(1938) 24 Cal.App.2d 1 — 16, 48

Statutes

California Evidence Code,
Section 352 — 20, 52

Section 353 — 24

Section 353(a) — 24

Section 403 — 25, 51, 52

Section 1101 — 18

California Penal Code,
Sections 182(1), 209, 211, 1538.5 — 2

Section 245-A — 10, 11

Section 459 — 2, 10

Section 1111 — 28

Section 12021 — 11

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PETITION FOR
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To The Honorable Warren E. Berger, Chief Justice and to The Honorable Associate Justices of the Supreme Court of the United States of America:

Appellant hereby petitions for a hearing to consider the decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, filed in this action on August 30, 1976, affirming the conviction of Defendant - Appellant in the Trial Court; and

the decision of the Supreme Court of California, rendered October 28, 1976.

STATEMENT OF THE CASE

Five-count amended information charging defendant with (count I) the kidnapping of Donovan Hargens for the purpose of robbery, in violation of Pen. Code §209, a felony, committed on 4 April 1972; (count II) burglary of an inhabited dwelling house, occupied by Donovan Hargens, in violation of Pen. Code §459, a felony, committed on 4 April 1972; (count III) robbery on 4 April 1972 of Donovan Hargens, in violation of Pen. Code §211, a felony; (count IV) robbery on 10 April 1972 of Robert Laske and Robert Baumgartner, in violation of Pen. Code §211, a felony; and (count V) conspiracy to violate Pen. Code §§ 211, 209 and 459, in violation of Pen. Code §182, subd. (1). Defendant pled not guilty, and a jury trial resulted in a hung verdict, 9-3. Defendant was tried again before a jury, which resulted in his being found guilty on all counts, with a finding of first degree as to count II, III and IV. Defendant was given concurring sentences on all counts, with a stay of execution being granted as to count V, until completion of sentences on counts I and IV, following which the stay was to become permanent. Defendant appealed from the judgment, from the denial of his motion for a new trial, and from denial of his Pen. Code §1538.5 motion. However, since defendant's brief on appeal did not mention either

motion, the Appellate Court considered each matter abandoned on appeal.

Appellant filed a petition for rehearing by the Court of Appeal, on the same issues set forth in this petition, on September 10, 1976. Such petition for rehearing was denied on September 15, 1976. A Petition for Hearing filed October 7, 1976 was denied by the Supreme Court of California on October 28, 1976.

STATEMENT OF THE FACTS

In the first jury trial, a co-defendant, one Kenneth M. Moran in Department 118 before the Hon. Leslie W. Light, was found guilty of the substantive counts, and another co-defendant, one Sidney Bartolatta, was acquitted.

The following in substance is the recitation of facts by the Court of Appeal: According to the evidence, Donovan Hargens owned "Don's Market" located in Pasadena. On April 4, 1972, at approximately 1:45 P.M., he took the store's receipts and drove to a bank to deposit them. (The evidence indicated that this was his usual procedure which he had followed for many years on a daily basis.) In the bank parking lot he was held up by a man who was about 5'11" tall, well-built and fairly strong looking, a "hippie" sort of person with "tattletale gray" hair. Hargens could not say whether the man was, or was not, Ronald Hayward.

Hargens wore glasses and had poor vision without them. Somehow, his glasses were knocked off of his nose when Hargens was placed face down in his own car and driven to his house, where another car and male driver quickly appeared. Thereafter, the two men handcuffed Hargens to his car's steering wheel, placed a gag in his mouth, and removed the cable from his car's battery. The newest arrival entered Hargens' house and removed a number of items from it, putting them into the second automobile. The man who could have been Hayward remained with Hargens most of the time. Later Hargens freed himself and found that many things were missing from his house, including his wife's fur.

On April 10, 1972, Baumgartner was employed as a bartender at Carson's Cocktail Lounge in Pasadena. On that date, he arrived at the bar at 7:00 a.m. and opened the rear door to be met by a man with a pistol. Inside the premises was the robber's "accomplice" and Mr. Laske, the clean-up man employed by the bar. The two robbers took money from the bar's safe and from Baumgartner. The man with the gun was about 5'-9" or 5'-10" tall, weighed approximately 160 pounds, had dark skin, and hair down to about his collar. After the hold-up, the robbers hand-cuffed Laske and Baumgartner to the bar rail, using what might be "Detective Special Romo" handcuffs.

Additional facts are: Mr. Harold Borek, owner of a Pasadena pawnshop, which had two or more employees in 1972, had dealt with

Mr. Pappageorge for about twenty (20) years and sold items to him at cost. He apparently knew Mr. Pappageorge as a constant familiar customer (R.T. 615 et seq. - "R.T." herein referring to the Reporter's Transcript on Appeal).

The two witnesses, Ronald Hayward and Alvin Timmons, were both convicted felons (R.T. 678 and R.T. 690-691, respectively).

The alleged crimes occurred on April 4 and 10, 1972; the co-conspirator Ronald Hayward told the police about these crimes about one year later (R.T. 645-649) and no criminal charges were filed until one year and two months thereafter. In the meantime Mrs. Pappageorge died. (See our referenced hereinbelow.) Another witness, Mr. Kodie, died (R.T. 604-605).

ARGUMENT

I.

THERE CAN BE NO FAIR TRIAL WHERE THERE IS TENUOUS CIRCUMSTANTIAL EVIDENCE, A COMPLETELY SUSPICIOUS EYE WITNESS ACCOUNT, TAINTED BY FAVORS, GLARINGLY IRRELEVANT AND HIGHLY DAMAGING EVIDENCE ADMITTED, AND THERE IS A DEFENSE COUNSEL WHO IS OVER EXTENDED IN HIS WORKLOAD, AND WHO REJECTS DEFENDANT'S PLEAS TO PUT ON FOUR OR MORE WITNESSES WITH CRITICALLY IMPORTANT TESTIMONY AND FAILED TO RAISE, (ACCORDING TO THE STATE OF CALIFORNIA COURT OF APPEAL), AN ISSUE OF RELEVANCY CONCERNING DYNAMITE; ALTHOUGH NONE OF THESE FACTORS OR EVEN ANY TWO OR THREE OF THESE FACTORS STANDING ALONE WOULD NOT CONSTITUTE GROUNDS FOR ORDERING A NEW TRIAL, NONETHELESS, WHEN WEIGHTED TOGETHER, THEIR CUMULATIVE EFFECT OUTWEIGHS THEIR INDIVIDUALLY JUSTIFIED ALLOWANCE BY A TRIAL COURT.

In the following statement, there is examined the question of whether all the points raised inthis Brief, with a few new ones in this section, do not constitute such an overwhelming abuse of defendant's right to a fair and impartial trial as to undermine the adversarial nature of a criminal proceeding so as to leave the form, but excising the substance, thereby producing a sham trial.

Mr. Henry Poyet died November 17, 1976, at the age of 78; he was the attorney in the first jury trial, wherein the dynamite evidence was excluded, upon his objection. He was associated as trial counsel in the second case, and Mr. John Marshall, of approximately the same age, was made co-counsel, because of the health of Mr. Poyet. At that time, Mr. Marshall claimed he had over 45 criminal cases pending, going to trial, etc., in the Criminal Courts Building in downtown Los Angeles. Several times prior to, and during the second trial, George Pappageorge requested that certain individuals, named hereafter, be called as witnesses, because they had information concerning the critical issues in the case: one John Weigel, one Larry Johnson, one Sam Carbone, one Percy Lanestry. As is pointed out hereinbelow, under Doyle v. Ohio, 96 S.Ct. 2240 (1976), if it is improper for a prosecuting attorney to comment on the failure of defendant to take the stand, then it should be improper and prejudicial for him to comment on the failure of witnesses to be called, where defense counsel is at fault for them not being called and not the defendant. (This may be highly unusual, but how else does a trusting

defendant protect himself from a sophisticated, overwhelmingly charming defense attorney who wants to get through the case as quickly as possible?)

I am informed and believe and on this information and belief allege that if Larry Johnson were called he would testify that on the day that George Pappageorge, Kenneth Moran, and Ronald Hayward drove to the New York Loan Company, it was a hot day, and the car air conditioner was on. Mr. Pappageorge rented out a limousine, sometimes for as high as $500 a day, to various movie or picture companies, and they rode in this car to the pawn shop. The parking space was very small, and everyone kidded Mr. Pappageorge that he could not park the car in that small space, but he did. Mr. Johnson will testify that this occurred after he moved his shop into the gas station of George Pappageorge, which was May 5, 1972. Mr. Johnson shall further testify that on that trip to that store, Mr. Pappageorge purchased handcuffs. (End of statement under information and belief.)

In the testimony of the owner of the New York Loan Company, he stated that he remembered Mr. Pappageorge coming in and buying a set of handcuffs. He did not say that he remembered Mr. Pappageorge coming in several times, or even more than one time. For some reason counsel did not cross-examine and elicit this information. Upon retrial, Mr. Borak's memory may be a little clearer than it was at the trial; he may recall that there was only one

purchase in the late spring and early summer of 1972.

Ronald Hayward was the only direct evidence that linked George Pappageorge to the alleged crimes. In the Probation and Sentence Hearing Reporter's Transcript, dated 4/2/75, People v. Hayward, Case No. A550 968, which hearing was held in Pasadena Branch of the Superior Court of the County of Los Angeles, it is stated therein that Hayward's testimony was given with the expectation for leniency: Cf. RT 27, lines 12-22 and 24-28; RT 31, line 14; RT 32, lines 1-13; RT 34, lines 3-13, 16-18 and; page 35; page 36, 37 and 38. Furthermore, testimony given by Deputy District Attorney John Watson, who was the trial prosecutor in both trials of George Pappageorge, stated that Ronald Hayward was the principal witness. Cf. Probation and Sentence Reporter's Transcript (hereafter referred to as P & S RT for convenience) 24, line 17.

At this hearing, Deputy District Attorney John Watson testified in behalf of Ronald Hayward, for the purpose of obtaining probation for Mr. Hayward.

(The first trial of George Pappageorge commenced November 14, 1974, and was declared a mistrial on December 17, 1974. On June 5, 1975, the second trial commenced, and the jury rendered its verdict on June 17, 1975.) For some reason, although Mr. Marshall was made aware of this transcript, no attempt was made on his part to obtain it prior to the start of

the second trial on June 5, 1975. I am informed and believe and on this information and belief allege that: In fact, George Pappageorge offered to obtain the transcript, but Mr. Marshall represented unequivocally that it was not needed.

It is interesting to note that the Probation and Sentence Hearing in Pasadena concerned a judgment of that Court which was announced on January 7, 1974, finding defendant guilty for assault with a deadly weapon upon the person of Mr. Pudinsky, the Chief of the California Highway Patrol. Pen. Code §245-A, and first degree burglary, Pen. Code §459. Sentence at that time was imposed, but appeal was taken and Mr. Hayward was allowed to be free on bail.

While Mr. Hayward was on bail, he continued a life of crime, including the ingesting of three different kinds of drugs on over 35 different occasions: Cf. P & S RT 27, 28, 29, 35, 39, 30: lines 23-24; P & S RT 40: lines 17-28; P & S RT 28.

It is interesting to note that Mr. Henry Poyet was present in Court during the Probation and Sentence Hearing. Cf. P & S RT 3-4.

On June 20, 1975, in Case No. A131866, Department NW"R", before the Hon. Harry V. Peetris, Judge presiding, Superior Court, County of Los Angeles, People v. Ronald Frederick Hayward, Mr. Hayward appeared for a plea with Mr. John Watson, Deputy District Attorney, appearing as the prosecutor for the County of Los Angeles! Needless to say, a plea

was entered of guilty to a violation of §12021 Pen. Code (Possession of Firearms by Previously Convicted Felon, (Pen. Code §245A, January 7, 1974)). (Possession of firearms was alleged to have taken place on February 5, 1975).

The Court then sentenced defendant to one year in the County Jail to run concurrent with time served in State Prison.

The plea was taken in the Van Nuys Superior Court, which is 17 miles from downtown Los Angeles, where Mr. Watson had his office. The plea was taken three days after the jury convicted George Pappageorge, and it is common knowledge that a plea may be advanced, or may be continued, for the purposes of bargaining. Apparently this pleas was entered as a result of a bargain, three days after George Pappageorge was convicted.

As a conclusion, the testimony of Ron Hayward should be given little or no weight. It appears to have been purchased.

An interesting question to ask is why did not Mr. Poyet, or Mr. Marshall, obtain a transcript of that Probation and Sentence Hearing on April 2, 1975, and use it to impeach both the credibility of Ronald Hayward and the motivation of the Deputy District Attorney, Mr. John Watson.

In the first jury trial of George Pappageorge, a co-defendant, Mr. Bartolatta, was acquitted; it was Ronald Hayward's testimony

which the jury weighed, in determining Mr. Bartolatta's guilt. There was no evidence of dynamite concerning Mr. Bartolatta. Apparently the jury disbelieved Ronald Hayward concerning Mr. Bartolatta.

The Court of Appeal in its decision missed the most important point: There were two trials; the first trial ended in a 9-3 decision and in the first trial, there was no evidence concerning dynamite. The deputy district attorney erred when he stated all the evidence to be introduced at the second trial was introduced at the first trial. Please reference Reporter's Transcript, 646. (Reporter's Transcript is hereafter referred to as RT for convenience). Cf. footnote 1, infra, p. 21.

Granted the tenuous nature of the evidence against George Pappageorge -- questionable evidence whether the handcuffs used were those purchased by George Pappageorge; a piece of paper observed at a distance of several feet behind the shop of George Pappageorge, which could have been a check stolen from Carson's; the candelabra stolen from Hargens, which was not of a unique design but could have come from the Hargens home; the fur from the Hargens home found in a suitcase, in the trunk of a car owned by Mr. Ken Moran!: to allow in such evidence concerning the dynamite was tantamount to shutting the door of the jury's mind before the facts so described were testified. A strong argument can be made that the jury would have acquitted George Pappageorge, because Mr. Bartolatta was acquitted. If no dynamite evidence had come in, and if Mr. Marshall, the

overstretched, overworked lawyer who predominated the second trial and who claimed to have 45 cases going at the same time in the Superior Court of downtown Los Angeles, had taken the trouble to put on the defense witnesses recommended by George Pappageorge, a jury could conceivably have returned an acquittal of George Pappagerorge.

In a letter dated June 1, 1976, from John H. Marshall to George Pappageorge, he stated as follows: "I say Judge Dibbs today who told me he had just been reversed by the District Court of Appeals on the very same grounds we have raised on your appeal in another case. He offered to bet me that your case would be reversed. He commented that the Brief we had filed was exceptionally well written and raised the issues very clearly and feels as I have said that the District Court of Appeals will probably reverse." Later on in the letter, he reminds Mr. Pappageorge that certain legal fees had not been paid. Needless to say, within the next 60 days, Mr. Marshall did not utilize the opportunity for oral argument before the Court of Appeal. This even though, in the same letter, of June 1, 1976, he states:

> "Before you get your hopes to (sic) high, I do want to tell you that the case which is the Morriss case is causing the District Attorney all kinds of problems and they are on the Attorney General's neck to seek a review of that case in the Supreme Court. If that happens we might be

> back where we started, but only time will tell."

This case of George Pappageorge represents an extreme example of a strange chain of circumstances locking unexpectedly into their bazarre places, culminating in a conviction, where the jury more probably than not, would have acquitted of the crime charged and convicted of the crime that was not charged: an alleged possession of dynamite. (The Moran automobile was driven to Mr. Pappageorge's station for new brakes. No evidence was introduced that Mr. Pappageorge knew the dynamite was in the car when the car was driven to the station.)

The failure of Deputy District Attorney John Watson to advise either the Court or the defense that a plea bargain had been reached with the unnamed co-defendant Ronald Hayward in the matter pending before the Criminal Court in Van Nuys, California, which plea bargain was performed June 20, 1975, was tantamount to that error proscribed by the Supreme Court of California in People v. Ruthford, 14 Cal. 3d 399, 121 Cal. Rptr. 261, 534 P. 2d 1341 (1975). In that case, the Court stated:

> "...he intends that the prosecutor engaged in prejudicial misconduct by failing to disclose to defense counsel the principal motivation for the adverse testimony of a key prosecution witness and by forestalling defense counsel's awareness of such motivation

through misrepresentation made to the Court. We conclude that prosecutor was guilty of prejudicial misconduct which denied defendant a fair trial and accordingly reverse the judgment."

George Pappageorge respectfully submits to this Honorable Court that if the jury had known that three days after the jury verdict was to come in Ronald Hayward and Deputy District Attorney John Watson would be entering into a plea bargain in a courthouse 17 miles from the courthouse that John Watson usually operated in, it is respectfully submitted that the jury would have acquitted George Pappageorge. For the failure to reveal this to defense counsel during the presentation of the defense case, may have prejudiced defendant in this regard: Attorney John Marshall may have then believed it was necessary to obtain those witnesses, and put the same on the stand, as requested by George Pappageorge, in order to reveal facts about Ronald Hayward's character, which would have shown that he was lying. It certainly would have helped, and the failure to present this knowledge to counsel, concerning these alleged crimes, the subject of the plea bargain on June 20, 1975, was tantamount to that error found grievous in People v. Ruthford, supra.

II.

THE DECISION OF THIS COURT HAS OVERLOOKED THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF DOYLE v. OHIO, 96 S.CT. 2240 (1976) AND WHICH IS CONTROLLING ON IMPORTANT ISSUES IN THIS CASE.

Appellant did not have to prove his innocence by presenting the 5 witnesses (See P. 47-48, infra) about whose absence the prosecutor commented. See Winkie v. Turlock Irrigation District, 24 Cal. App. 2d (1938) discussing impermissibility of comment where witnesses are equally available to both parties. The District Attorney is charged by statute to seek and obtain justice, not convictions - the prosecutor instead chose to rely on Appellant's failure to produce non-material witnesses as a way to "fill an evidentiary gap," which is forbidden by the ruling in People v. Medina, 41 Cal. App. 3d 438 (1974).

In Doyle v. Ohio, supra, the Supreme Court disapproved use during trial of defendant's silence maintained after Miranda warnings had been given.

In the instant case, defendant's exercise of the right to be passive, to make the District Attorney prove his case beyond a reasonable doubt, proved too tempting to the zealous prosecutor. The closing argument of the prosecutor made the exercise of this right appear to be a cover-up, a sign of consciousness of guilt, and prejudicially "filled the evidentiary gap" in this razor-thin case with a bridgework of brick-bat comments manifesting evasion, furtiveness and stone-walling it by Mr. Pappageorge. It was a neat trick -- but not a clean one. Without comments about failure to produce witnesses, only suggestion and innuendo was left in the prosecutor's case in chief.

Given the slight strength of the tenuous, if at all, corroboration and use of accomplice testimony and based upon the emphasis of Doyle v. Ohio, 96 S.Ct. 2240 (1976) the use was prohibited, highly prejudicial and the conviction must be set aside.

III.

THERE IS ADDITIONAL POST-TRIAL EVIDENCE WHICH CASTS STRONG DOUBT ON CREDIBILITY OF RONALD HAYWARD.

Ronald Hayward's testimony and the evidence regarding someone else's dynamite (which Mr. Pappageorge never, solely possessed) are

the sine qua non for the conviction of Mr. Pappageorge. Incorporated by reference as though fully set forth herein are these statements concerning Ronald Hayward and his plea bargain of June 20, 1975, stated hereinabove in Section I.

IV.

ALL EVIDENCE RELATING TO EXPLOSIVES SHOULD HAVE BEEN EXCLUDED AND FAILURE TO DO SO RESULTED IN PREJUDICIAL ERROR BY THE TRIAL COURT.

A. The Prejudicial Effect of the Evidence Far Outweighs Whatever Probative Value It May Have Had, and Under Evidence Code §1101, All References to Appellant's Involvement with Explosives Should Have Been Excluded.

Evidence Code §1101 provides, in part:

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts. . ."

Where proffered evidence concerns other crimes, it should be scrutinized with great care in light of its inherently prejudicial effect, and should be received only when its connection to the crime charged is clearly perceived. People v. Enos, 34 Cal.App.3d 25 (1973).

Evidence of prior convictions or of prior acts not resulting in a conviction is admissable to prove a material fact such as motive, intent, knowledge, or possession of means useful or necessary for the commission of the crime charged. People v. Carter, 46 Cal.App.3d 260 (1973). People v. Enos, supra.

Probative value depends upon the extent to which evidence tends to prove an issue by logic and reasonable inference, the importance of the issue to the case, and the necessity of proving the issue by means of this particular piece of evidence. People v. Delgado, 32 Cal. App.3d 242 (1973).

Prejudicial effect refers to the likelihood that a jury will convict a person because of his bad record, bad moral character, or disposition to commit crimes. People v. Allums, 47 Cal. App.3d 654 (1975); People v. Delgado, supra.

Indeed, the duty to balance probative value against the danger of undue prejudice is the duty of the trial court, and the court must exclude

the proffered evidence if the probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. People v. Delgado, supra, 32 Cal.App. 242 (1973); Evidence Code §352.

In the case at bar, evidence concerning the explosives in Kenneth Moran's automobile does not in any way provide evidence of a material fact (such as motive, intent, or knowledge) relevant to the crimes charged. The trial court admitted this evidence solely to prove the motivation and state of mind of Ronald Hayward. (See RT 734-744). The court recognized that the explosives could not establish a conspiracy for the crimes charged, nor could they be used to infer that Appellant knew of items in the car other than the explosives (RT 742-744).

The Court's decision to admit was explained in terms of credibility:

"As to the issue of the state of mind of Hayward, I think there is a very real issue of credibility involved. I think that it is necessary that the jury have some explanation as to whay Mr. Hayward is talking about when he's talking about the deal he made with the police to get an OR release, for whatever value it might have.

"It may well react against him as well as for him, but I think the jury is entitled to that explanation, and

> I feel that limited relevancy outweighs the prejudicial effect that it might have if given with the proper limiting instruction." (RT 743).

Thus, this "limited relevancy" establishes limited probative value. The real issue becomes the extent of the prejudicial effect of the evidence.

The substantial prejudicial effect seems apparent. At Appellant's first trial, no evidence of the explosives was admitted (RT 736).[1/] Kenneth Moran, the co-defendant in the first trial was convicted; the jury was unable to decide upon Mr. Pappageorg's guilt or innocence. In the second trial, after a recognition of its limited relevancy, the evidence was admitted, and Appellant was convicted. The prejudicial effect

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1/ Contrary to the assertion of the attorney general (RB 29), the reference in the record on page 646 to the fact that "in the last trial we went into every excruciating detail, and the reason was at the defense insistence," this statement does not refer to admitting evidence of the explosives. A careful reading in context reveals that this refers to admitting evidence about Hayward's assault on Walter Pudinski, the California Highway Patrol Commissioner (RT 646 and 647; in lines 1-10 and especially lines 11-12). It does not refer to introduction of evidence of dynamite. (See especially RT 646; lines 7-10). No evidence of dynamite was introduced at the first trial.

occurred notwithstanding the trial judge's limiting instructions.

The California Supreme Court in People v. Bisogne, 4 Cal. 3d 582 (1971), disapproved the admission of evidence against defendant of an unrelated criminal act involving a deceased co-defendant. The evidence was admitted pursuant to the prosecution's desire to add credibility to certain witnesses of the robbery with which defendant was charged. The Court acknowledged that the prejudicial effect outweighed any provative value:

> ". . . relevance [of the evidence of the shootout] to defendant's participation in the robbery is entirely too attenuated to justify its admission against him. The prejudicial effect of associating defendant with a person who engaged in violent conduct on a totally unrelated occasion far outweighed its probative value to show that Borrell and, by inference, defendant, perpetrated the Long Beach robbery together. (See Evidence Code §352.)" (First bracketed matter added for clarity.)

In People v. Talley, 65 Cal. 2d 830 (1967), two defendant's were tried on burglary counts. Each defendant made statements which implicated the other, thus these statements were prejudicial. However, as to defendant Elwood, the error was held harmless because he had been found in possession of the stolen items.

As to defendant Curtis, the court stated:

> "(Curtis') extrajudicial confession to the burglary at the dress shop had some tendency to incriminate him with respect to the burglary at Giljohann's store since loot from both was together at Elwood's house. The evidence of Curtis' guilt of the burglary at Giljohann's store is not strong, and in our opinion the beneficiary of the error in admitting Curtis' statements has not proved beyond a reasonable doubt that the error did not contribute to the verdict against him on the count charging the burglary at Giljohann's store (citation omitted)." 65 Cal.2d 830 at 841.

In the instant case, the Court need not even speculate as to the prejudicial effect resulting from the trial judge admitting the evidence of explosives: Appellant's conviction effectively confirms the prejudice. Moreover, because the rest of the evidence against Appellant is circumstantial, proof of Appellant's guilt "is not strong." The People have failed to demonstrate beyond a reasonable doubt that the error has not contributed to Appellant's conviction, thus his conviction should be set aside.

B. The Objection to Admission of This Evidence Was Properly Raised at Trial and the Issue Has Thus Been Preserved for Appellate Review.

It is well settled that objections not raised at trial cannot be made for the first time in appeal. People v. Cannady, 8 Cal.3d 379 (1972). People v. Martin, 28 Cal.App.3d 956 (1972); Evidence Code §353(a).

Appellant's trial counsel interposed objections before Alvin Timmons began to testify (RT 522-525). Admittedly, the exact scope and emphasis of counsel's objections is clouded; nonetheless there was express disagreement with the admission of certain statements declared "hearsay to this defendant." (RT 524). The objection was reaffirmed during Timmon's testimony (RT 539-542). The issue having been brought to the attention of the trial court, it may be reviewed upon appeal. Evidence Code §353.

Nor may any objection be deemed waived simply because Appellant's counsel chose to refer to the explosives during his cross-examination of Timmons. Once a trial Court has admitted certain evidence, it would constitute unwise trial tactics indeed to simply ignore it. Appellant's counsel did not withdraw his motion to strike, thus the objection remained.

Moreover, even if this issue was waived or not properly raised, this Court may note any errors where the interest of justice required it. See, People v. Norwood, 26 Cal.App.3d 148 (1972). Given the highly prejudicial nature of this evidence, and given the adverse effect it in all likelihood had upon Appellant's case, the Court should at least examine the contention of error.

In any event, Appellant's counsel argued for exclusion under Evidence Code Section 403. Both defense counsel and the district attorney argued with reference to both Hayward's and Timmons' testimony and the apparent purpose of defense counsel was to exclude all references to explosives (RT 733-741). The issue has thus been preserved for appellate review.

The numbing effect produced by the revelation of the farce involving the dynamite and Mr. Pappageorge effectively blinded the trial court concerning the quantum of evidence, or lack of it, produced by the Prosecutor: At page 16, lines 11-14 inclusive, Transcript of Probation and Sentence hearing entitled: "Advisement of Right to Appeal," on Friday, November 14, 1975, the trial judge states, in part:

> "The court must also recognize that the other individuals that Mr. Pappageorge masterminded in this conspiracy are doing their time

> on substantially the same evidence upon which Pappageorge was convicted. . ."

With all due respect to the Court, how can the Court make this statement when in the first trial, a hung-jury regarding Mr. Pappageorge, the dynamite was never mentioned to the trier of fact? EXHIBIT "A".

If the alleged facts concerning the dynamite farce had no effect on the jury, note the Court's depiction of the effect of the knowledge on the Probation Department and Evaluation Committee at Chino State Prison for 90 day study, at page 9, (Ibid.):

> "To some extent, I believe both the probation officer and the Department of Corrections may have been swayed by the contents of the report of the prior conduct concerning the explosives. . ."

The cumulative effect of 1) the alleged facts regarding the dynamite and 2) the accomplice's testimony, together form the "substantial evidence" upon which Mr. Pappageorge was convicted and the Court recognized this, at page 9, lines 7 through 21, inclusive, (Ibid.):

> "I recognize that the testimony upon which you were convicted in this case rested to a great extent upon the testimony of those who were

accomplices in the conspiracy, of those that you aided and abetted in the commission of the crime; . . ."

With the utmost respect to the trial Court, it is observed that the Court's next statement is almost a tacit recognition of the abased theory of guilt which went out with the "Star Chamber" and "the rack and the screw" - the theory of guilt by association, at page 9, lines 21 through 24, inclusive, (Ibid.):

> "that perhaps to your dying day you will regret that you ever became involved with the individuals who have been named as codefendants in this case, some of whom have been sentenced; . . ."

The Court then proceeds to discuss Mr. Pappageorge's allegedly questionable testimony. But let us stop here. Would Mr. Pappageorge have needed to testify at all if the dynamite farce had been excluded from the trier of fact? The only difference between the first and second trial was the introduction of the alleged facts of the dynamite farce.

Additionally, Mr. Marshall protested that the dynamite evidence was immaterial, and thus objected to its relevancy. He further protested that it was prejudicial to Mr. Pappageorge (RT 586, lines 1-5; RT 733; RT 740). Although the objections thus raised were not articulated as clearly as they might have been, nonetheless the objections were thus raised. However, the

Court, although taking these under advisement, never did strike the dynamite testimony. Mr. Pappageorge contends the court should not have let it in, and at the least should have ordered it stricken. Even this would not have eliminated the overwhelming prejudice created by the dynamite testimony. To refuse to strike such testimony was error, and no limiting instruction could reverse the prejudicial effect. This is especially true where, as here, the alleged corroborating evidence was so tenuous, it would be a superhuman feat to be a juror and ignore this dynamite testimony.

V.

THERE IS INADEQUATE CORROBORATION OF RONALD HAYWARD'S TESTIMONY AS REQUIRED BY PENAL CODE SECTION 1111.

Penal Code §1111 provides in relevant part:

> "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient

if it merely shows the commission of the offense or the circumstances thereof."

The prosecutor alleged that four items served as corroboration of the existence of a conspiracy and the connecting link between Mr. Pappageorge and the conspiracy:

1. The handcuffs purchased by Appellant;

2. The candelabra stolen from the Hargens;

3. The fur coat Timmons found in the suitcase; and

4. The "Carson's" imprint observed by Robert Hawkins.

It is submitted that none of these items constitutes the "independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged" People v. Mardian, 47 Cal.App.3d 16 (1975).

A. Appellant's Purchase of the Handcuffs May Not Serve as Corroboration Because It Is an Activity Equally Consistent with Innocence as with Guilt.

The purchase of handcuffs is an entirely legal activity. Regardless of Appellant's explanation for doing so, he had every right to purchase the four pairs of Detective Special Romo handcuffs from the New York Loan Company in Pasadena. No criminal purpose is attached to this activity unless the testimony of accomplice Ronald Hayward is used and this the court cannot do. The purchase of handcuffs, as a legal activity, cannot serve as corroboration of Hayward's testimony.

In People v. Mardian, supra, 47 Cal. App.3d 16 (1975), at page 42 the Court stated in part:

> "...Corroborating evidence is insufficient if it does no more than cast a grave suspicion upon the accused or merely connects him with the crime's perpetrators. . ."

(In this case, with dope stored in a suitcase at a friend's house, the contents were observed by a babysitter, the woman of the house and defendant's ex-wife.)

(Here, the defendant was seen carrying an attache case into the house. This activity is equally consistent with innocent behavior, therefore, it can't corroborate. To be valid, it needs aid from the immunity witness to link the defendant to the crime. But the other 2 witnesses who observed the contents will corroborate because they saw the defendant in actual possession of the contraband.)

B. There Is No Evidence to Establish Appellant's Possession of the Handcuffs Used in the Carson's Bar Robbery, But Even if Possession Is Shown, There Is No Evidence to Establish Appellant's Exclusive Dominion and Control Over Them.

Harold Borek, proprietor of the Pasadena pawn shop, testified that he sold 4 pairs of Romo handcuffs to Appellant. Mr. Borek was unable to say when the sale occurred. (See RT 618, lines 16-19; RT 617, lines 7-11; RT 621, lines 12-27; and Mr. Borek did not know when he had to reorder, RT 624, lines 2-4). Mr. Borek did not know what serial numbers were on the items sold. He could only say that he gave Appellant the top four boxes from his case, that these probably were the first four boxes from the most recent shipment of handcuffs, and that maybe the

serial numbers had been packed in sequential order. Furthermore, others in store sold handcuffs (RT 621, lines 10-11). Either Moran or Hayward could have bought other cuffs! Thus, only by drawing inference upon inference may one conclude that Appellant received the pair of handcuffs which eventually were used in the robbery at Carson's (serial number M8236).

C. Others Had Access to Handcuffs, Whatever Their Serial Number Was. There Was No Exclusive Possession and Control By Mr. Pappageorge.

Assuming arguendo that Appelland did receive the handcuffs numbered "M8236," there remains the serious problem of Appellant's control over them. Appellant testified that he kept the handcuffs on an open shelf at his gas station. Furthermore, Appellant, Hayward, Robert Hawkins, and Donald Hargens all testified to the presence of Hayward and/or Moran at Appellant's business, and their occasional assisting with the work in the Winter-Spring of 1972. If the handcuffs were on an open shelf, then either Moran or Hayward could easily have acquired a pair or two without Appellant's knowledge; not through Mr. Pappageorge's deliberate action, but through his inaction in leaving them on open shelves. No evidence

adduced at trial, other than accomplice Hayward's testimony, renders this theory inherently implausible, which provides possession with a rational explanation consistent with innocence.

Thus, the mere fact that Appellant may have possessed a certain pair of handcuffs cannot serve as corroboration of the accomplice.

Appellant's investigator found an identical set with the questioned serial number on it. This raises some interesting questions, not the least of which is the possibility of the inaccuracy of the number-raising device employed by Det. Warner, and the possibility of duplicated serial numbers by the manufacturer (a not unheard of occurrence).

D. No Evidence Established Appellant's Possession of the Candelabra, Therefore, They Cannot Corroborate Hayward's Testimony. Alvin Timmons Testified That Appellant's Wife, Deceased at the Time of Trial, Delivered Candelabra to Timmon's Residence. The Photographs of These Candelabra Were Taken At Timmon's House. No Evidence Adduced at Trial Ever Placed the Candelabra In Appellant's Possession or in Appellant's Home. The Only Alleged Link to Mr. Pappageorge Is the Alleged Delivery by Mrs. Pappageorge.

The Prosecutor made much of the absence of witnesses called by the defense. Reversing this argument, if the police knew about these crimes one year after their commission, why was prosecution delayed nearly one and 1/2 more years; the result has been the loss of possible witnesses' testimony through death, departure from the State of California, etc. (The Court may take judicial notice of the date of death of Mrs. Anna Pappageorge of Monrovia, California, on October 7, 1973 as listed in the official records of the Registrar-Recorder of the County of

Los Angeles. See Exhibit "B" attached.)

It is doubtful that the candelabra, because they were won in a horseshoe contest over 25 years ago, were terribly distinctive in any degree. (Contest prizes tend to be less than expensive.) It is no wonder that the witness was so hazy and speculative in her attempt at identification.

In People v. Jenkins, 34 Cal.App.3d 893 (1973), the Court of Appeal for the Second District, the court reviewed the following:

A truckload of stolen suits were in defendant's truck. The only items in the truck were these stolen suits. When questioned by the police at the scene, defendant said, "You didn't catch me driving it did you?" "No." "Then I have nothing to worry about." Accomplice testified to defendant's participation. Because defendant (1) had possession of (2) recently stolen property this sufficed as corroboration. Mr. Pappageorge was not shown to have possession, and the wedding was eight months after the robbery - not a recent event! The inference (it was Hargen's candelabra) based on inference (Mrs. Pappageorge arrived with the candelabra, ergo, Mr. Pappageorge possessed them) based on inference (if Mr. Pappageorge possessed them, it must have come from a non-recent robbery) is too tenuous a thread to connect Mr. Pappageorge to the robbery and the inferential establishment of possession in Mr. Pappageorge. Jenkins indicates possession must be recent.

There are many plausible explanations such as Mr. Pappageorge traded auto parts for the

candelabra, without knowing they were stolen, or without having taken part in the burglary-robbery.

In People v. Ruscoe, 54 Cal.App.3d 1005 (1976) the Court of Appeal upheld conviction of grand theft after a contest rigging "scheme" based on recent possession of Five Thousand Dollars ($5,000) and the cumulative effect of defendants' testimony and the giving of false or misleading statements to the police. But the possession occurred within a short time after the theft. This distinguishes the instant case from Ruscoe, because Mr. Pappageorge's alleged inferential possession occurred, if at all, eight months after the crime. The candelabra cannot serve as evidence corroborative of the accomplice testimony.

E. Appellant's Knowledge of Part of the Contents Located in the Back Seat of a Car Not Owned By Him Does Not Establish His Knowledge of the Contents of a Closed and Covered Suitcase Found Inside the Trunk of That Car.

Alvin Timmons testified that: Appellant requested Timmons to remove certain items from a Simca car owned by Kenneth Moran.

Appellant specifically stated that these items were explosives. Timmons further testified that: Appellant made this request because: Moran's wife had left the Simca at Appellant's station for brake repair work (an entirely innocent act).

According to Timmon's testimony, Appellant never mentioned the suitcase or its contents; he spoke only of the dynamite and the location of the car key. Timmons found the suitcase in the trunk, whereas much of the contraband was located in the back seat. Furthermore, Timmons found the suitcase the next day and discovered the contents only because he believed the case might hold dynamite caps.

The only person to question Timmons about the suitcase was Moran after he was released from jail, some time after the dynamite was dumped. According to Timmons, Moran specifically asked about the suitcase and expressed concern for its contents, "a valuable fur coat" (RT 539). Apparently Appellant had inquired only of the location of the dynamite. (See Reporter's Transcript 533-534).

Nothing in either Hayward's or Timmon's testimony establishes or suggests that Appellant knew of the suitcase or the fur coat inside. Merely because Appellant knew of obvious contents of Moran's car, on bailment to Appellant for a legitimate purpose, cannot even by inference establish that Appellant knew of the suitcase in the trunk and its contents.

Indeed, the trial court dismissed the prosecuting attorney's contention that the suitcase gave rise to an inference of Appellant's knowledge of it and the contents thereof. (See RT 736-738 and 743-744.)

Furthermore, even assuming Appellant knew of the suitcase and the coat therein, there again is lacking the immediate possession of recently stolen property required by the courts. Appellant's possession, if any, was only by way of bailment of the car to Appellant in his scope of business. Timmons, however, was unable to state when Appellant approached him with the request, stating it was some time in 1972. Such equivocation cannot establish that this coat was "recently" stolen. Thus, given the questionable possession and the indefinite time frame, and the accidental nature of the placement allegedly at the station, Appellant cannot be charged with knowledge of the suitcase and the fur coat. Consequently, the fur coat cannot serve as corroboration of the accomplice testimony.

F. The Paper Stamped "Carson's" Cannot Corroborate Ronald Hayward's Testimony Because It Was Observed in a Public Access Area and Appellant's Exclusive Possession of the Paper Was Not Established.

Robert Hawkins testified that he observed a pale green piece of paper in the large trash bin behind Appellant's business. He also saw a rubber stamp imprint bearing the name "Carson's" and possibly the words "For Deposit Only." He was approximately one foot away from the paper when he observed it. He did not pick it up and examine it and could not say that the piece of paper was, in fact, a check. Hawkins further testified that Ronald Hayward was present at Appellant's business at this time, helping him (Appellant) move.

One's trash remains within one's possession until it has been mingled with other trash and has lost its identity and meaning. People v. Edwards, 71 Cal.2d 1096 (1969).

However, such rationale applies only where the trash has been within defendant's control and subject to defendant's reasonable expectation of privacy. See, e.g.: United States v. Kahan, 350 F.Supp. 784 (S.D.N.Y. 1972); People v. Krivda, 5 Cal.3d 357 (1971); vacated, 409 U.S. 33 (1972), aff'd 8 Cal.3d 623 (1972);

People v. Edwards, 71 Cal.3d 1096 (1969). Neither situation exists here. The trash bin Hawkins spoke of was a large commercial-type bin, in back of Appellant's business, and within easy and unrestricted access to anyone. It was the type which may be changed to other locations. This free access automatically negatives any assumption that the contents of the trash bin are impliedly in Appellant's possession. Without a showing of this piece of paper in Appellant's possession, it may not be used to corroborate the accomplice testimony. See, People v. Hathcock, 8 Cal.3d 599 (1973); People v. Medina, 41 Cal.App.3d 438 (1974) (discussion of defendant's actual possession of the murder weapon as corroboration).

G. There Exists no Other Independent Testimony Which Connects Appellant to the Crimes Committed By Hayward and Moran.

In the absence of specific factors such as possession of an instrumentality of the crime, possession of recently stolen goods, or evidence of flight by the defendants, courts will look to any other independent testimony to corroborate an accomplice.

For example, in People v. Hathcock, 8 Cal.3d 599 (1973), the court found adequate corroboration based, inter alia, upon a coroner's

report which verified the accomplice's description of the murder. In People v. Tewksbury, 15 Cal. 3d 972 (1976) adequate corroboration was found in witnesses whose "testimony of the corpus delicti and the time, place and manner of the commission" of the crime was consistent with the accomplice's testimony. 15 Cal. 3d at 972. The court also noted that a possible murder weapon was found in defendant's former residence six days after the crime, and a surviving victim of the robberies testified that one of the assailants was armed with a similar gun.

In People v. Randono, 32 Cal. App. 3d 164 (1973), corroboration was established by a witness who received false information from defendant. This corroboration was in addition to the testimony of witnesses who actually observed the liquor (obtained by false pretenses) sitting in the storeroom of defendant's premises. The witness also testified that the seventy (70) cases he observed were gone when he came back two weeks later and that they could not have been "used up" in that short time period. The court held the possession coupled with the unusual usage constituted corroboration.

A defendant's words, conduct, declarations or testimony may corroborate the accomplice. People v. Tewksbury, 15 Cal. 3d 972 (1976); People v. Ruscoe, 54 Cal. App. 3d 1005 (1976). In the instant case, there is no evidence of Appellant's words, or conduct, or declarations which corroborate Hayward, nor does his testimony establish his criminal proclivity. Cf. People v. Ruscoe, supra. (Defendant's

explanation for his threats and for his fraudulent scheme did not have to be believed by the jury; and that testimony combined with false statements to the police constituted adequate corroboration.)

Thus, there exists no independent testimony linking Appellant to the crime or establishing in him exclusive possession of any instrumentality or fruits of the robberies. Accomplice Hayward's testimony stands uncorroborated and Appellant's conviction must be reversed.

The rational of the requirement of Penal Code §1111 lies in the inherent lack of trustworthiness in testimony given with the expectation of leniency or immunity. People v. Tewksbury, 15 Cal. 3d 970 (1976); People v. Gordon, 10 Cal. 3d 460 (1973). Thus, sufficiency of the corroborating evidence is established if it tends to connect the defendant with the crime in a manner which reasonably satisfies the jury that the testifying accomplice is telling the truth. People v. Thurman, 28 Cal. App. 3d 725 (1972).

An "accomplice" includes anyone who may be liable for prosecution for the same offense for which the defendant is being tried. People v. Kageler, 32 Cal. App. 3d 738 (1973). A grant of immunity will not dissipate the requirement of corroboration. See, People v. Perry, 7 Cal. 3d 756 (1972); People v. Randono, 32 Cal. App. 3d 164 (1973).

To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or

assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. People v. Perry, supra, 7 Cal. 3d 756 (1972).

The corroboration must do more than raise conjecture or a suspicion of guilt. It need not go to every element of an accomplice's testimony; it may be circumstantial; and it may be slight and entitled to little weight when standing alone. People v. Perry, supra; People v. Randono, supra, 32 Cal.App. 3d 164 (1973).

Corroborating evidence is insufficient if it does no more than cast a grave suspicion upon the accused, or merely connect him with the crime's perpetrators. People v. Mardian, 47 Cal.App. 3d 16 (1975).

Moreover, each item alone may be insufficient, but the cumulative effect may be sufficient to corroborate. People v. Ruscoe, 54 Cal.App. 3d 1005 (1976).

Certain specific facts have consistently been held to be sufficient corroboration:

1. Defendant's possession of recently stolen property (People v. Jenkins, 34 Cal.App. 3d 893 (1973))

2. Evidence of flight or attempts to escape (People v. Perry, 7 Cal. 3d 756 (1972))

3. Attempts to conceal identity or whereabouts (People v. Perry, supra.)

In People v. Ruscoe, supra, 54 Cal.App. 3d 1005 (1976), defendant was convicted of grand theft after "rigging" a radio contest. The disc jockey was charged as as an accomplice to the scheme, and testified as to the operation of their plan. Corroboration was found in: defendant's possession of a large amount of cash the same week the contest prize money had been paid to his girlfriend; defendant's giving false statements concerning the origin of the cash when he was arrested; defendant's signing to release the money to his girlfriend knowing of its illegality; and defendant's own testimony of his involvement in the scheme. The court indicated that the jury was not required to believe defendant's explanation for his involvement.

In People v. Jenkins, supra, 34 Cal.App. 3d 893 (1973), defendant was apprehended with a truckload of recently stolen suits. An accomplice testified that defendant participated in the theft and the court held that the defendant's possession of the recently stolen property was adequate corroboration.

Significantly, if the defendant's activity is equally consistent with innocent behavior, such activity cannot serve to corroborate an accomplice's testimony. People v. Mardian, 47 Cal.App. 3d 16 (1975).

In the case at bar, the evidence may cast suspicion upon Appellant, or it may connect him with the crime's perpetrators, (Mardian, supra) but it does not constitute independent evidence sufficient to corroborate the accomplice

Hayward's testimony.

VI.

THE PROSECUTING ATTORNEY COMMITTED PREJUDICIAL ERROR IN COMMENTING ON APPELLANT'S FAILURE TO PRODUCE CERTAIN WITNESSES AND RAISE CERTAIN DEFENSES, GIVEN THE SLIGHT WEIGHT OF THE EVIDENCE AGAINST APPELLANT.

The leading case of Griffin v. California, 380 U.S. 609 (1964) established that a defendant's failure to testify at trial could not consitutionally be the subject of comment by the prosecutor. California specifically incorporated the rule in People v. Vargas, 9 Cal.3d 470 (1973). Appellant acknowledges that this rule does not extend to comments on the state of the evidence or on the defense's failure to introduce material evidence or to call logical witnesses. People v. Vargas, supra.

However, the United States Supreme Court has recently expanded the scope of this rule in Doyle v. Ohio, 96 S.Ct. 2240 (1976). There the Court disapproved use during trial of a defendant's silence maintained after Miranda warnings had been given. In essence the defendant's exercise of his rights was being used

against him in the later criminal proceedings. Thus the general rule is that a defendant's exercise of his rights may not be used against him for impeachment or as a basis upon which to infer guilt.

Likewise, a defendant has the right to have the prosecution bear the burden of establishing his guilt beyond a reasonable doubt. Knowing this, a defendant may choose not to testify or may choose to put on a limited defense. Comment on the former strategy is constitutionally proscribed. Griffin v. United States, supra. Comment on the latter strategy, equally based upon the same expectation of rights, ought not to be allowed, at least where such comment is shown to be prejudicial. For example, in People v. Medina, 41 Cal.App.3d 438 (1974), the court discussed the extent to which a prosecutor's comment may have been prejudicial. Two guidelines were posited:

1. The seriousness of the error and

2. The impact of the error upon the jury's consideration of the evidence in light of the strength of the case against the defendant.

The Court suggested the primary question to ask was, would the prosecutor's comment serve to fill an evidentiary gap in the prosecution's case? The Court further stated:

> "Arguably, any case in which substantially all of the direct evidence against the defendants is the

testimony of accomplices, which must be viewed with distrust, is a close case. This one was especially close in view of the many other factors which called into question the credibility of these witnesses." 41 Cal.App.3d at 463.

In the case at bar, Appellant had a right to expect the prosecutor to prove his case beyond a reasonable doubt. Appellant was not required to produce any evidence or witnesses. He chose to explain his defense, and to subject himself to cross-examination. The prosecutor, in turn, chose to rely on Appellant's failure to produce non-material witnesses as a way to "fill an evidentiary gap" in his own case. [Note well - these are not the same witnesses Defendant asked his Counsel to call to testify!]

Most of the evidence in this case came from accomplices or other witnesses whose credibility was in question. Thus, like People v. Medina, supra, this is a close case, especially in view of the inadequate corroboration and the prejudicial error in admitting evidence concerning the explosives.

The prosecutor commented on at least 5 witnesses Appellant could have called: Ken Moran, the original co-defendant; previous customers of Appellant; merchants who sold handcuffs to Appellant; the holder of a deposit refund check issued by Appellant and cashed at

Carson's Bar; and Appellant's daughter who married in 1972 (RT 819, 860, 866, 867).[2]/

Comment upon one party's failure to produce witnesses is permissible unless these witnesses are equally available to both parties. Winkie v. Turlock Irrigation District, 24 Cal. App.2d (1938).

Each of these witnesses was available to the prosecution either by request or by subpoena. The prosecution discovered at trial the loaction of the merchants from whom Appellant purchased handcuffs, and could have brought them into Court. The prosecution could have recalled the bartender from Carson's Bar to ask about the deposit checks. The prosecution could have obtained through discovery Appellant's business records indicating the name of prior customers. Appellant did not have to prove his innocence by presenting these people. The prosecutor, however, chose to rely upon Appellant's exercise of his right to not prove his innocence and to use the exercise of that right to fill the gaps in his own case.

2/ Indeed, the prosecutor received exculpatory information from Appellant during cross-examination but chose not to pursue it, even after asking Appellant to produce certain paperwork in court. RT 753-755.

Appellant relied upon the prosecutor's burden to prove him guilty; that reliance was used against him and, based upon the emphasis of Doyle v. Ohio, 96 S.Ct. 2240 (1976), such use cannot be permitted.

Moreover, given the slight strength of the corroboration and the use of accomplice testimony, the prosecutor's error was highly prejudicial and Appellant's conviction must be reversed.

VII.

APPELLANT WAS PREJUDICED BY THE FAILURE OF DEFENSE COUNSEL TO PURSUE CERTAIN DEFENSES, PRESERVE OBJECTIONS FOR APPEAL, AND, IN GENERAL, RENDER EFFECTIVE REPRESENTATION.

A defendant bears the burden of establishing his counsel's ineffectiveness. People v. Stanworth, 11 Cal.3d 588 (1974). Proof of the ineffectiveness must be demonstrable reality and not a speculative matter. People v. Stephenson, 10 Cal.3d 652 (1974). Moreover, the record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of a crucial defense, reducing the trial to a "farce and a sham." People v. Martinez, 14 Cal.3d 533 (1975); People v.

Ibarra, 60 Cal.2d 460 (1963).

In the case at bar, Appellant has been prejudiced by counsel's failure to object to certain evidence, thus losing any appeal rights. For example, People's exhibit 10 (Invoice from Mitchell Mogol, Inc., RT 615) patently does not fall within the business exception to the hearsay rule. Counsel made no objection to its introduction, nor did he cross-examine on the validity of the invoice (RT 615 - 628). As this invoice was the only way of establishing the probable serial numbers on the handcuffs sold to Appellant, without such objection, Appellant is precluded from seeking appellate review and thus a valuable defense was lost.

Secondly, Robert Hawkins' testimony concerning the piece of paper stamped "Carson's" which he observed in the trash also was clearly hearsay: the print on the paper was being offered to establish the truth of its contents. This paper and the "Carson's" imprint was offered as corroboration of Hayward's testimony. Failure to object resulted in the loss of another crucial defense in that Appellant is precluded from attacking the evidence on appeal.

Next, counsel arguably did not properly object to Timmon's testimony concerning the explosives and Appellant's connection with them. Arguably the objection was made not pursuant to Evidence Code Section 352 but on the grounds of hearsay absent establishment of the conspiracy. Counsel made this argument only inferentially

without articulating the correct law behind it (RT 523-525, 539-543). This is not merely a question of trial tactics, but of ignorance of the elements of the case and the applicable law. Counsel argued under section 403 of the Evidence Code when the record clearly shows he was concerned with the prejudicial effect versus the probative value. See, e.g., RT 540, lines 26-27; 740, lines 2-8.

In addition, counsel failed to object to the myriad details elicited by the prosecutor concerning the quantity, quality and attempted destruction of the explosives in Moran's car (RT 528-530; 532-533). Introduction of this evidence patently was irrelevant and served only to prejudice the jury, especially in light of its having been excluded at the first trial.

As a fourth example, defense counsel made no objections whatsoever to the prosecutor's thinly veiled suggestion that the handcuffs purchased by Appellant's witness bearing the same serial numbers as the ones used in the Carson's robbery were tampered with or altered. Failure to object is particularly heinous in light of there being no independent set of handcuffs against which the jury could compare. The prosecutor's inflammatory insinuations were obviously out of line and required some comment to reduce the prejudicial effect. Appellant cannot appeal the prosecutor's misconduct because no objection was given, thus still another valuable defense was lost.

This is not a case where Appellant, a layman, could be expected to object to the court about the inadequacy of the legal representation. First of all, Appellant cannot reasonably be expected to know the workings of the hearsay rule. Secondly, Appellant cannot reasonably be expected to know the significance and implication of sections 352 and 403 of the Evidence Code. In short, these errors were errors of law of which Appellant would have no knowledge.

Significantly, however, one counsel was a family friend of Appellant (RT 689, lines 9-13) and as such reasonably occupied a position of trust more extensive than usual in an attorney-client relationship. Reference is hereby made to Exhibit "C" attached hereto and incorporated by reference as though fully set forth herein, which is page 4 of "Advisement of Right to Appeal," the transcript of the Probation and Sentence hearing of Mr. Pappageorge, which occurred on Friday, November 14, 1975. With this greater trust, Appellant would be more likely to refrain from criticism or questioning of his friend-attorney and the co-counsel. Thus Appellant was not able to freely object to counsel's conduct, even assuming Appellant was cognizant of the legal mistakes made.

Thus, the record abounds in instances of counsel's failure to pursue vital issues of law which patently were crucial to Appellant's defense. This, coupled with this being an extremely close case where any error could be prejudicial to Appellant, denied Appellant effective representation of counsel.

Finally, none of the witnesses (the few who were still alive when this matter was finally prosecuted (almost 2-1/2 years after the robberies)) who could have exonerated or explained defendant's behavior as exculpatory were called to testify. Assuming, arguendo, they were available, why weren't they called?

CONCLUSION

For the reasons stated above, Petitioner respectfully urges this court to reverse Petitioner's conviction and to grant any other relief this court may find just and appropriate.

Respectfully submitted,

JAMES JOSEPH LEWIS

Attorney for
GEORGE PAPPAGEORGE

the past, although maybe I didn't know everything; but, on the other hand, he's entitled to that consideration, I respectfully submit, Your Honor.

THE COURT: What Mr. Watson says is substantially correct: That other than a financial loss, should bail be set on appeal and the defendant escapes the jurisdiction of the court, there is no further penalty other than that which has already been imposed that could be imposed on the defendant for his failure to appear at the time and place required by the court for further proceedings on appeal.

The court must also recognize that the other individuals that Mr. Pappageorge masterminded in this conspiracy are doing their time on substantially the same evidence upon which Pappageorge was convicted. The court must also recognize that Donovan Hargens had really no appeal or no bail on appeal from the kidnap-robbery-burglary when Pappageorge's handcuffs had him handcuffed to the steering wheel of that car and his house was being burglarized. All of the appeals of Mr. Hargens at that time went unheeded by those who actively participated in the robbery. The law requires that these acts be imputed to Mr. Pappageorge as the aider and abettor and co-conspirator in this action.

The request for bail on appeal will be denied.

MR. MARSHALL: Thank you, Your Honor.

MR. POYET: Thank you, Your Honor.

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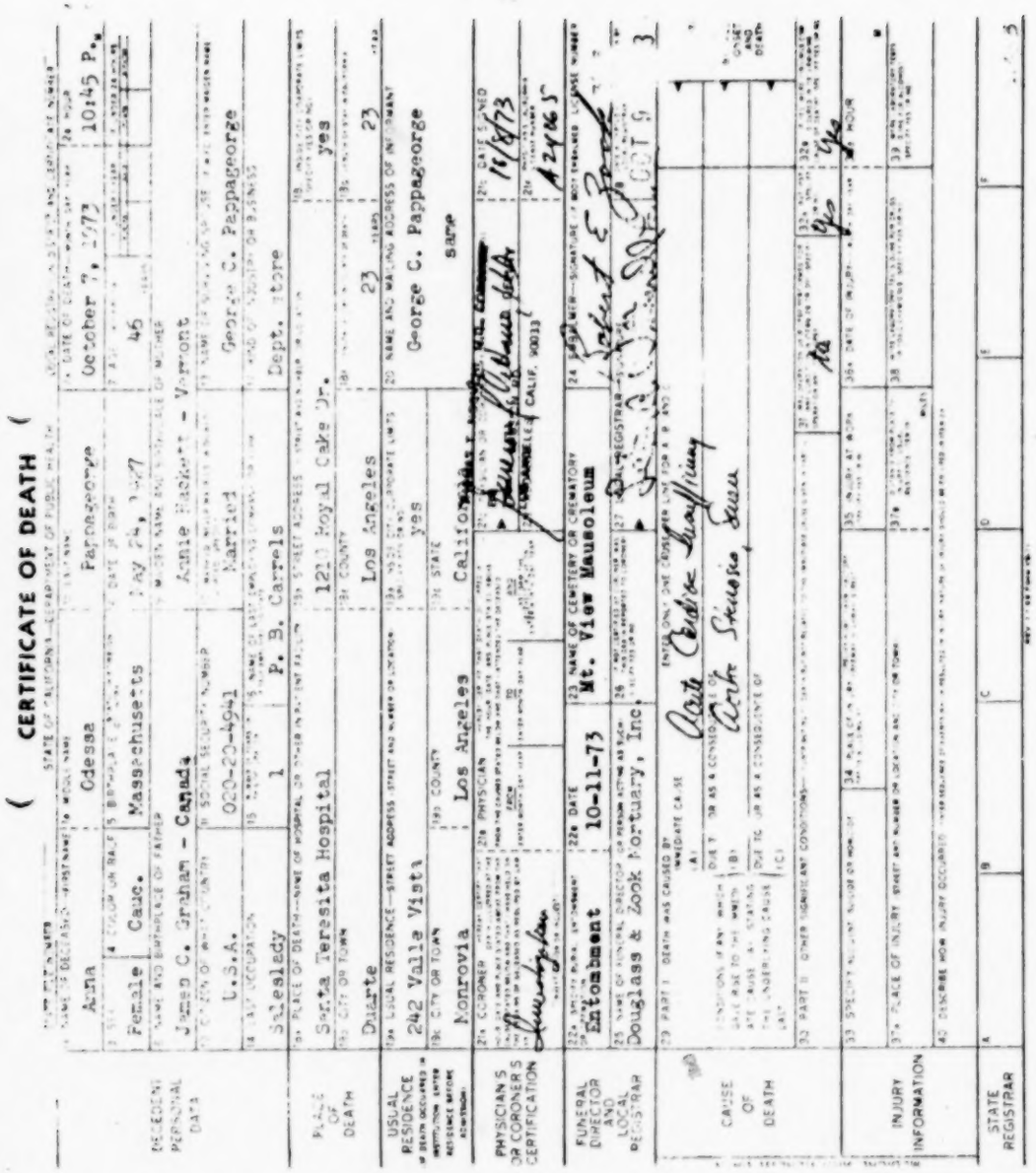
EXHIBIT "A".



CERTIFICATE OF DEATH

1. NAME	Anna	Odessa	Papageorge
2. SEX	Female	4. RACE—White, Negro, Indian, Japanese, Chinese, Filipino, or (specify)	Caucasian
5. DATE OF BIRTH (Month, Day, Year)	May 24, 1907	6. AGE (Last birthday)	46
7. MARITAL STATUS	Married	8. IF MARRIED, WIDOWED, OR DIVORCED—NAME OF HUSBAND OR WIFE	George C. Papageorge
9. USUAL OCCUPATION	Saleslady	10. KIND OF BUSINESS/INDUSTRY	Dept. Store
11. BIRTHPLACE (State or Foreign Country)	U.S.A.	12. CITIZEN OF WHAT COUNTRY	Canada
13. SOCIAL SECURITY NUMBER	020-20-4941	14. RESIDENCE—STREET AND NUMBER	1220 Royal Oak Dr.
15. CITY OR TOWN	Duarte	16. COUNTY	Los Angeles
17. STATE	California	18. HOW LONG IN THIS PLACE	23 yrs
19. INSIDE CITY LIMITS?	yes	20. NAME AND MAILING ADDRESS OF INFORMANT	George C. Papageorge same
21. PLACE OF DEATH—NAME OF HOSPITAL OR OTHER INSTITUTION	Santa Teresita Hospital	22. DATE OF DEATH	10/8/73
23. NAME OF CEMETERY OR CREMATORY	Mt. View Mausoleum	24. FUNERAL DIRECTOR—SIGNATURE AND LICENSE NUMBER	Douglass & Cook Mortuary, Inc.
25. DATE REGISTERED	10-11-73	26. REGISTRAR'S SIGNATURE	[illegible]
27. CERTIFICATE OF DEATH NUMBER	3		

PART I. DEATH WAS CAUSED BY: (a) IMMEDIATE CAUSE — Ruptured Aortic Aneurysm; (b) DUE TO OR AS A CONSEQUENCE OF — Arteriosclerosis; (c) DUE TO OR AS A CONSEQUENCE OF — ; (d) ANTECEDENT CAUSE — ; INTERVAL BETWEEN ONSET AND DEATH — 3 days

PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN PART I

28. PHYSICIAN'S OR CORONER'S CERTIFICATION	28a. DATE SIGNED 10-11-73
29. WAS CASE REFERRED TO CORONER?	30. DATE OF INJURY
31. PLACE OF INJURY	32. DESCRIBE HOW INJURY OCCURRED
33. SPECIFY WHETHER INJURY WAS WORK RELATED	34. DATE OF INJURY

BEST COPY AVAILABLE

May it please the court, it has been my privilege in life to know a great many men, but I must say this in all candor standing before Your Honor, and I want to express how I feel inwardly and outwardly and based upon my evaluation of Pappageorge over a period of many years. It is unfortunate that we find ourselves in this situation here, but this is the way it is.

I myself know that Pappageorge is a good man, personally, throughout the years. He's always been practical, punctual on everything that he has done. I know of no occasion where he has taken unjust or unfair advantage of any living soul, to my personal knowledge. Also I know that he is a tireless worker. I knew his mother, his sister and his family personally, myself; and I know that from the days he left back East and came out here to settle down in Pasadena that he has worked unceasingly as a man.

Personally, I never have found him wanting. He has been gracious and considerate with people that he worked with. He has always aspired to do things in what I call a noble and altruistic manner. And to see a situation of this kind is hard for me personally, myself. I personally like Pappageorge. I know he's a good man and I know that no matter what Your Honor does that he will profit by this experience that he finds himself in. He's got his matters over there that are being worked out.

He needs to go ahead, and no matter what's done here -- I'll speak now on the question of his keeping confidence with any order that Your Honor might place upon him --

EXHIBIT "C."